

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	ORDER
SHULEM LANDAU	:	DTA NO. 821732
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 2001.	:	

Petitioner, Shulem Landau, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), brought a motion, filed October 19, 2007, seeking an order of summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9(b)(1). Neither petitioner nor his representative (Mayer Rispler, CPA) submitted a response to the Division's motion, although permitted to do so by November 18, 2007. Thus, the 90-day period for issuance of this determination began on November 18, 2007. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Shulem Landau, a Notice of Deficiency, dated January 16, 2007, addressed to petitioner at a Brooklyn, New York, address. The notice bore assessment identification number L-027947034-3 and asserted tax, penalty and interest due of \$5,983.68 for the year 2001.

2. The Notice of Deficiency was issued as a result of petitioner’s failure to file a New York State and City personal income tax return for the year 2001 and was based upon information received from the Internal Revenue Service.

3. On April 17, 2007, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS), protesting the Notice of Deficiency dated January 16, 2007. The Request for Conciliation Conference contained the same Brooklyn, New York, address for petitioner as that used by the Division in issuing the Notice of Deficiency. In addition, petitioner attached to the Request for Conciliation Conference a copy of his resident income tax return for the year 2001. Petitioner claimed this return was filed with the Division in November 2001. It also contained the same Brooklyn, New York, address as that to which the Notice of Deficiency was addressed.

4. On May 4, 2007, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice[] was issued on [J]anuary 16, 2007, but the request was not received until April 19, 2007, or in excess of 90 days, the request is late filed.

5. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System (CARTS) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service (USPS) through return of the CMR to the CARTS Control Unit.

6. Each computer-generated notice of deficiency is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "CERTIFIED NO." The CMR lists an initial date (the date of its printing) in its upper left corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page one of the CMR stated an initial date of January 4, 2007 ("20070041700," referring to the 4th day of the year and time of day expressed on a 24-hour basis, or 5:00 P.M.) which was manually changed to "1/16/07."

7. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various

branch offices of the USPS located in the Albany, New York, area, in this instance the Albany General Mail Facility, where a postal employee accepts the envelopes into the custody of the USPS and affixes a dated postmark and his signature or initials to the CMR. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

8. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the USPS on the following day and returns it to the CARTS Control Unit.

9. In the instant case, the CMR is a 643-page, fan-folded (connected) computer-generated document entitled "Certified Record for Presort Mail-Assessments Receivable." There are 7,066 items of mail listed on the CMR. Each item of mail listed on the pages of the CMR is assigned a certified control number. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

10. Information regarding the Notice of Deficiency issued to petitioner is contained on page 288 of the CMR. Corresponding to certified control number 7104 1002 9730 1695 5369 is notice number L-027947034, along with petitioner's name and address, which is identical to that listed on the Request for Conciliation Conference and the New York State personal income tax return for the year 2001. Page 288 of the CMR bears the postmark of the Albany General Mail Facility of the U.S. Postal Service, dated January 16, 2007.

11. The last page of the CMR, page 643, contains a preprinted entry of "7,066" corresponding to the heading "Total Pieces and Amounts." Under this number appears the initials of a Postal Service employee and a postmark of the Albany General Mail Facility of the USPS

bearing the date "January 16, 2007." The number "7,066" is not circled nor is there handwritten the number "7,066" on the last page of the CMR.

12. In the ordinary course of business, the Division generally does not request, demand or retain return receipts from certified or registered mail.

13. The Division sent a request for delivery information/return receipt after mailing form (USPS Form 3811-A) to the Claims and Inquiry Office of the USPS - Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, requesting delivery information on the notice of deficiency described above. The Division received a response from the USPS which stated that certified mail number 7104 1002 9730 1695 5369 was delivered on January 22, 2007 to petitioner's Brooklyn, New York, address. The response also shows the scanned signature image of recipient as that of petitioner.

14. The facts set forth above in Findings of Fact "5" through "13" were established through the affidavits of Patricia Finn Sears, sworn to on September 27, 2007, James Steven VanDerzee, sworn to on September 28, 2007 and Heidi Corina, sworn to on October 1, 2007. Ms. Sears is employed as the Supervisor of the Division's CARTS Control Unit. Ms. Sears's duties include supervising the processing of notices of deficiency. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division's Registry Unit. Mr. VanDerzee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS. Ms. Corina is a legal assistant in the Office of Counsel. Ms. Corina's duties include the preparation of United States Postal form 3811-A.

15. On May 25, 2007, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated May 4, 2007.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions

are insufficient”” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992], *citing Zuckerman v. City of New York, supra*).

C. Here, petitioner did not respond to the Division’s motion. Since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the Sears, VanDerzee and Corina affidavits, those facts are deemed admitted (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Whelan v. GTE Sylvania, Inc., supra*, 582 NYS2d at 173).

D. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a], [b]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

E. Where the taxpayer files a petition or request for conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice of deficiency (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see id*).

F. The affidavits of two Division employees, Patricia Finn Sears and James VanDerzee, provide adequate proof of the Division's standard mailing procedure for the mailing of notices of deficiency by certified mail. The affidavits generally describe the various stages of producing and mailing notices of deficiency. However, on the last page of the CMR, the number of pieces received has not been circled nor has the number of pieces indicated as received been handwritten by a USPS employee. The presence of the USPS postmark on page 288 of the CMR is insufficient to show that the items of mail listed on that page was actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address; nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to the taxpayer was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by circling the total number of pieces received or writing the total number of pieces received as requested by the Mail Processing Center. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (*see Matter of Cal-Burrito Co.*, Tax Appeals Tribunal, July 30, 1998, *see also Matter of Roland, supra; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). Therefore, it is concluded that the Division has not met its burden of establishing proper mailing of the notice of deficiency.

G. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). The affidavit of Heidi Corina, request for delivery information/return receipt after mailing form (USPS Form 3811-A) and the response of the USPS indicate that the notice of deficiency was received by petitioner on January 22, 2007. Therefore, running the statute of limitations from the date of receipt of the notice, the 90-day period ends on April 22, 2007. As this date falls on a Sunday, the subsequent day, Monday, April 23, 2007, becomes the statutory deadline (General Construction Law § 20, 25-a).

H. The request for conciliation conference was mailed on April 17, 2007. The 90-day period to file the request expired on April 23, 2007. Accordingly, it is found that the request was timely filed.

I. The Division of Taxation's motion for summary determination is denied. The matter will be scheduled for a hearing as soon as practicable.

DATED: Troy, New York
February 14, 2008

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE